

FILE COPY

U.S. Supreme Court, U. S.
FILED
APR 18 1949
CHARLES ELMORE UNOPLBY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 738

CHARLES H. DENNY, *et ux*, DOROTHY MAE DENNY,
PETITIONERS,

VERSUS

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.

✓
MICHAEL J. KAINE, JR.,
National Bank of Commerce Bldg.,
San Antonio 5, Texas,
Counsel for Petitioner.

INDEX.

SUBJECT INDEX.

Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2-4
Statement	4-5
Specifications of errors to be urged	5-8
Reasons for granting the writ	8-10
Conclusion	11

CITATIONS.

STATUTES.

Title 10, Section 96, United States Code.....	2
Title 28, Section 1254, United States Code.....	2
Title 28, Section 2674, United States Code.....	3
Title 28, Section 2680, United States Code.....	3

REGULATIONS.

Army Regulation No. 40-505, Paragraph 2, Section b, Sub-section 3	3
--	---

Supreme Court of the United States

OCTOBER TERM, 1948.

No. _____

CHARLES H. DENNY, *et ux*, DOROTHY MAE DENNY,
PETITIONERS,

versus

UNITED STATES OF AMERICA, RESPONDENT.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT.**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on December 17, 1948 (R. 27), and in which order denying rehearing was entered January 21, 1949 (R. 38).

OPINIONS BELOW.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 27-30) is reported in 170 F. (2d) at page 365.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals was entered December 17, 1948 (R. 27-30). The order denying the rehearing was entered January 21, 1949 (R. 38). The jurisdiction of this Court is invoked under Section 1254, subsection 1, Title 28, United States Code, as amended September 1, 1948.

QUESTIONS PRESENTED.

Whether the failure of an officer, not the commanding officer of the Brooke General Hospital at Fort Sam Houston, Texas, an agency of the respondent, to dispatch an ambulance to transport the petitioner, Dorothy Mae Denny, to said Hospital for medical attention during childbirth, and failure to furnish the necessary hospital and medical services to said petitioner at the time of the birth of her child, from which she suffered damages by reason of neglect, is exempted from liability under the law as a mere discretionary function, and whether respondent owed petitioners a duty to provide them with medical attendance and ambulance service, when the respondent had a furnished ward for such purposes and it was practicable to do so.

STATUTES AND REGULATIONS INVOLVED.

Title 10, Section 96, *United States Code* reads as follows:

"Medical attendance for families of officers and men. The medical officers of the Army and con-

tract surgeons *shall* whenever *practicable* attend the families of the officers and soldiers free of charge."

Army Regulation No. 40-505, Paragraph 2, Section b, Sub-section 3, reads as follows:

"Whenever *practicable*, the wife, dependent children, and servants of persons enumerated in "b" (1) above; also other dependent members of the family when residing with such persons provided they are not legally dependent upon an individual not in the military service."

Title 28, Section 2674 of the *United States Code* reads as follows:

"2674. LIABILITY OF THE UNITED STATES.

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act of omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

Title 28, Section 2680, Sub-section (a), of the *United States Code*, reads as follows:

"2680. EXCEPTIONS.

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT.

The petitioners, Charles H. Denny and wife, Dorothy Mae Denny, brought this suit under the provisions of the law relating to Tort Claims, to recover damages because of the alleged negligence of respondent in failing to furnish an ambulance to transport petitioner, Dorothy Mae Denny, to the Brooke General Hospital, an Agency of the respondent, and in failing to furnish the necessary hospital and medical services at the time of the birth of petitioners' child, and that as a result of such negligence, plaintiff's child was born dead and as a result petitioners sustained damages, the allegations being in broad and general terms, petitioners being prepared to show that petitioner, Dorothy Mae Denny, has been nervous and up-set ever since said incident and her health impaired. (R. 2-4).

Respondent filed a motion to dismiss the complaint on the grounds: (1). That respondent's agents were exercising, performing or failing to exercise or perform a discretionary function; and (2). Because as a matter of law respondent owed no duty to petitioners to provide them with medical attendance or service (R. 4-5).

The District Court sustained respondent's motion to dismiss and peremptorily dismissed the action (R. 12).

The Court of Appeals affirmed the judgment of the District Court (R-27-30).

Thereafter, on January 6, 1949, petitioners filed their petition for rehearing (R. 32-37), and on January 21, 1949, rehearing was denied (R. 38).

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1). In overruling and not sustaining petitioners' 1st assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioners' complaint.

(2). In overruling and not sustaining petitioners' 2nd assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioners' complaint, when as a matter of law the hospital at Fort Sam Houston was provided by the United States of America for the purpose of taking care of maternity cases such as petitioners', and it was both practicable and customary for the medical officers, employees, and attendants of said hospital to attend officers' and soldiers' wives who were pregnant, up to and including childbirth.

(3). In overruling and not sustaining petitioners' 3rd assignment of error because the Trial Court erred in sustaining the respondent's motion to dismiss petitioner's complaint, when as a matter of law under the statutes of the United States the medical officers of the Army and said hospital at Fort Sam Houston were under obligation to attend Mrs. Dorothy Mae Denny, because it was practicable for them to do so at said time, in that the hospital was equipped and prepared for the purpose of caring for such cases, and it therefore becomes a fact question to be submitted and heard on the merits.

(4). In overruling and not sustaining petitioners' 4th assignment of error because the Trial Court erred in sus-

taining respondent's motion to dismiss petitioner's complaint, because if the evidence would show that it was practicable for the medical officers and hospital to attend the petitioner, Mrs. Dorothy Mae Denny, then they could not use their discretion and it was not a discretionary function as to whether or not they would attend her, and they could not refuse to do so, and said matter therefore became a fact question to be submitted on the merits.

(5). In overruling and not sustaining petitioners' 5th assignment of error because the Trial Court erred in refusing to hear evidence and not permitting petitioner to submit evidence on the hearing in connection with respondent's motion to dismiss petitioners' complaint, because if the evidence would show that the hospital at Fort Sam Houston was prepared by the United States Government and equipped by the United States Government for the purposes of such cases and of delivering the baby of Mrs. Dorothy Mae Denny, and that it provided a special ward for such patients, for the express purpose of completely and fully taking care of officers' wives and wives of enlisted men, and that it was both practicable and customary for the medical officers, attendants, and employees of the Army at said hospital to attend said wives up to and including childbirth, then under the laws and statutes of the United States the medical officers of the Army and said hospital were under obligation to so attend her, because it was practicable for them to do so, and they could not use their discretion and it was not a discretionary function of an individual officer to fail and refuse to do so.

(6). In overruling and not sustaining petitioners' 6th assignment of error because the Trial Court erred in overruling and not sustaining Petitioners' Motion for a New Trial and Re-Statement of the Case because it is alleged clearly in said Motion for a New Trial and Re-Statement

of the Case that the officers, attendants, and hospital at Fort Sam Houston were under obligation to take care of Mrs. Dorothy Mae Denny since it was both practicable and customary for such maternity cases to be handled at the hospital and the officers and hospital attendants could not use their discretion and it was not a discretionary function of theirs under the circumstances to pass upon said matter.

(7). In overruling and not sustaining petitioners' 7th assignment of error because the Trial Court erred in overruling Petitioners' Motion for a New Trial and Re-Statement of the case because as a matter of law under the facts alleged therein the Court should have granted the new trial and permitted petitioners to file their First Amended Complaint which was tendered in connection therewith.

(8). In overruling and not sustaining petitioners' 8th assignment of error because the Trial Court erred in refusing to grant Petitioners' Motion for a New Trial which clearly shows that it was both practicable and customary, and not a discretionary function as to whether or not petitioner's wife should be taken care of at the Fort Sam Houston Hospital when Mrs. Dorothy Mae Denny gave birth to said child.

(9). In holding that "any negligent breach of duty on the part of Army medical authorities which may have existed, in failing to extend promptly the gratuitous medical services requested, clearly could not have resulted in any actionable damage," under the facts and circumstances in this case.

(10). In holding that "the liability of the United States under the Federal Tort Claims Act does not extend to cases where, as here, injury results from the failure to perform a mere discretionary function of duty, even though the discretion involved be abused", under the facts and circumstances in this case.

(11). In holding that the original complaint is a suit by petitioners to recover damages for the negligent death of their child when said complaint on its face shows as follows: "Petitioners say that as a result of the negligence and carelessness of the respondent they have been damaged in the sum of Fifty Thousand Dollars (\$50,000.00), together with interest, reasonable attorney's fees and court costs, and for general and special relief," in that said allegation is a general allegation for all damages sustained by reason of said negligence, and petitioners were prepared to show that Mrs. Dorothy Mae Denny has been nervous and upset ever since said accident, and that her health has been impaired, all due to the negligence of the respondent, its officers, employees and attendants.

REASONS FOR GRANTING THIS WRIT.

(1). The Court of Appeals exceeded its authority in holding that the original complaint was a suit by petitioners to recover damages for the negligent death of their child because said complaint on its face shows that as a result of the negligence and carelessness of the respondent, they sustained damages, said allegation being a general allegation for all damages sustained by reason of said negligence, and petitioners were prepared to show that Dorothy Mae Denny has been nervous and upset ever since said incident and her health has been impaired.

The original complaint filed in this cause is broad and general in its terms. Respondent never at any time called upon petitioners to allege specifically in what manner and in what particulars they were damaged.

(2). The decision of the Court of Appeals is erroneous in sustaining the action of the District Court in peremptorily dismissing petitioners' complaint without hearing any evidence.

Title 10, Section 96, of the United States Code, provides that medical officers of the Army and contract surgeons *shall* wherever *practicable* attend the families of the officers and soldiers free of charge. Petitioners were prepared to show that it was not only practicable but actually for many months prior thereto such Army surgeons at the Brooke General Hospital at Fort Sam Houston, Texas, had in fact attended petitioner, Mrs. Dorothy Mae Denny and rendered her medical services and advice.

We are not concerned with whether petitioners, after a hearing, would have been entitled to damages. We are concerned only with the question of whether the respondent's officer not the commanding officer was exercising and performing or failing to exercise and perform a discretionary function vested in it by law and regulation, and secondly, whether the respondent under the attendant circumstances owed any duty to petitioners to provide Dorothy Mae Denny with medical attendance and medical and hospital service and ambulance service during such childbirth. Petitioners were in a position to prove at said time that during the entire period of pregnancy Dorothy Mae Denny made frequent trips to the aforesaid Hospital where she was given medical treatment, attendance and supervision in the preparation for said childbirth; that she was assured by respondent's agents, servants and employees that they would continue to take care of her and render her all medical and hospital treatment and supervision until after the child was born; that petitioner, Charles H. Denny, was an officer in the United States Army; that said Hospital is maintained by respondent; that a ward therein was provided for maternity cases; that it was not only practicable, but universally customary for said Hospital to furnish such treatment and supervision to officers' and soldiers' wives who were pregnant up to and including childbirth.

It is elementary that the use of the word "shall" in connection with the third person makes it mandatory for the Army surgeons to render such service when "practicable." If it was mandatory for such officers to render such service, then, of course, it was not a discretionary function. Petitioners were ready, able and willing to show that it was not only practicable but universally customary for said Hospital to have rendered such services and were further prepared to show after much delay and dilatory tactics, and after the child died, that said Hospital actually dispatched two ambulances for the purpose of taking petitioner, Dorothy Mae Denny, to said Hospital for treatment. Therefore, petitioners submit that it was practicable for respondent to have furnished such medical treatment and since the furnishing of such service was mandatory, it could not have been discretionary.

Prior to the passage of the Tort Claims Act, the Congress was confronted with the considering and disposing of private claims against the Government. Congress, in waiving immunity from Tort liability, fixed the basis to be "*under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred.*" It is a universal rule that if a physician abandons a case without giving his patient such notice and opportunity to procure the services of another physician, such conduct subjects him to the consequences and liability resulting from the abandonment of the case. Petitioners were prepared to show that at the critical stage of the case the Army surgeons abandoned or at least neglected the case, causing the injuries to Dorothy Mae Denny's health.

CONCLUSION.

For the reason stated, it is respectfully submitted that this application for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. KAINE, JR.,

National Bank of Commerce Bldg.,

San Antonio 5, Texas,

Counsel for Petitioner.

INDEX

	<i>Page</i>
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	4
1. A claim of the character here asserted by petitioners is not comprehended by the Federal Tort Claims Act	5
2. Petitioners' contention that the complaint should be read as embracing some cause of action other than one for the wrongful death of their child, is unsup- portable	6
Conclusion	10
Appendix	11

CITATIONS

Cases:

<i>Allaire v. St. Luke's Hospital</i> , 184 Ill. 359	7
<i>American Banana Co. v. United Fruit Co.</i> , 213 U.S. 347	7
<i>Berlin v. J. C. Penney Co., Inc.</i> , 339 Pa. 547	7
<i>Bonbrest v. Kotz</i> , 65 F. Supp. 138	7
<i>Buel v. Railroad</i> 248 Mo. 126	7
<i>Cuba Railroad Company v. Crosby</i> , 222 U.S. 473	7
<i>Dennis v. Village of Tonka Bay</i> , 151 F. 2d 411	9
<i>Dietrich v. Northampton</i> , 138 Mass. 14	7
<i>Drobner v. Peters</i> , 232 N.Y. 220	7
<i>Federal Life Insurance Co. v. Ettman</i> , 120 F. 2d 837, certiorari denied, 314 U.S. 660	9
<i>Gorman v. Budlong</i> , 23 R.I. 169	7
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321	6
<i>Ledbetter v. Farmers B. & T. Co.</i> , 142 F. 2d 147, cer- tiorari denied, 323 U.S. 719, rehearing denied, 323 U.S. 813	9
<i>Leimer v. State Mut. Life Assur. Co.</i> , 108 F. 2d 302 ..	9
<i>Lewis v. Steves Sash & Door Co.</i> , 177 S.W. 2d 350.....	7
<i>Lipps v. Milwaukee E. R. & L. Co.</i> , 164 Wisc. 272	7
<i>Lloyd v. Ramsay</i> , 192 Iowa 103	6
<i>Long v. United States</i> , 78 F. Supp. 35	6
<i>Magnolia C.C.B. Co. v. Jordan</i> , 124 Tex. 347	7
<i>Newman v. City of Detroit</i> , 281 Mich. 60	7
<i>Parmiter v. United States</i> , 75 F. Supp. 823	6
<i>People ex rel Sheppard, The v. Dental Examiners</i> , 110 Ill. 180	6
<i>Spell v. United States</i> , 72 F. Supp. 731	7
<i>Stanford v. St. Louis-San Francisco Ry. Co.</i> , 214 Ala. 611	7
<i>State of Maryland v. United States</i> , 165 F. 2d 869	6

<i>Stemmer v. Kline</i> , 128 N.J.L. 455	7
<i>Tahir Erk v. Glenn L. Martin Co.</i> , 116 F. 2d 865	9
<i>Telegraph Co. v. Cooper</i> , 71 Tex. 507	7
<i>United States v. Seaman</i> , 17 How. 225	6
<i>Wiltse v. United States</i> , 74 F. Supp. 786	7
Statutes:	
Act of July 5, 1884, 23 Stat. 112, 10 U.S.C. 96	5, 6
Act of June 25, 1948 (Pub. Law 773, 80th Cong., 2d sess.) (Federal Tort Claims Act), Sec. 39, 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680	2
Federal Tort Claims Act, 60 Stat. 842, 28 U.S.C. 921 et seq.:	
Section 410(a)	6, 11
Section 421(a)	3, 4, 5, 11
Miscellaneous:	
Restatement, Torts, Sec. 869	7

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 738

CHARLES H. DENNY, ET UX, DOROTHY MAE DENNY,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Western District of Texas rendered no opinion in this case. The opinion of the Court of Appeals for the Fifth Circuit (R. 26-29) is reported at 171 F. 2d 365.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on December 17, 1948 (R. 29). A petition for rehearing was denied on January 21, 1949 (R. 36). The petition for a writ of certiorari was filed on April 18, 1949. The juris-

diction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the failure to furnish free Army medical and ambulance service to an Army officer's wife is a failure to perform a "discretionary" function, and thus within the exceptions set forth in Section 421(a) of the Federal Tort Claims Act.

2. Whether, assuming that the failure to furnish such service does not fall within the exception, petitioners may recover for the negligent death of a stillborn child where such recovery is not allowed by applicable state law.

STATUTE INVOLVED

The pertinent provisions of the Federal Tort Claims Act¹ are set out in the Appendix, *infra*, p. 11.

STATEMENT

Petitioners' claim for damages is based upon the birth of a stillborn child. In their "Complaint for

¹ The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed, and its provisions were revised and reenacted into law as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (Pub. Law 773, 80th Cong., 2d sess.). Section 39 of the repealing act provides that existing rights and liabilities shall not be affected by the repeal. Since the case at bar arose prior to the repeal, any rights which petitioner may have against the United States are governed by the Federal Tort Claims Act as it existed at the time of the repeal. It is the former provisions of the Act, therefore, which are set out in the Appendix, *infra*, p. 11.

Negligent Death", filed on August 1, 1947 in the United States District Court for the Western District of Texas, and brought under the Federal Tort Claims Act, petitioners, as the "natural father and mother and next of kin of their infant son, Joseph Denny, who is now deceased," alleged that petitioner Charles H. Denny was an Army officer; that the Brooke General Hospital (an Army hospital in Fort Sam Houston, Texas) had agreed to furnish his wife, petitioner Dorothy Mae Denny, with prompt medical attention during her pregnancy; that the hospital was negligent in failing to dispatch an ambulance immediately upon her beginning labor on December 16, 1945; and that as a result of such negligence she gave birth on that day to a child "which was dead at the time of its birth" (R. 2-3).

In addition to filing an answer denying negligence, the United States moved to dismiss the complaint on two grounds: (1) the furnishing of medical service to an Army officer's wife was a discretionary function within the exclusion contained in Section 421(a) of the Federal Tort Claims Act exempting claims based upon the failure to perform a discretionary function; and (2) the complaint fails to state a cause of action because no duty was owed by the United States to furnish petitioners with medical service.

At the argument on the motion to dismiss, petitioners agreed that the only "act of negligence charged" in the complaint was the Army hospital's

failure to "dispatch an ambulance to [Mrs. Denny] when she was beginning labor, and that as a result of such negligence that the child was still-born" (R. 10). Petitioners further stated that they were "damaged by reason of the fact that the child died by reason of [the Army hospital's] negligence" in failing to dispatch the ambulance at the proper time (R. 11). The district court, at the conclusion of the argument, dismissed the complaint, and thereafter also denied petitioners' "Motion for a New Trial and Reinstatement of the Case" (R. 11, 12, 17).

On appeal, the court below affirmed. It held that the furnishing of medical service to Army dependents is a discretionary function and that any negligent breach in failing to extend such service is not actionable because of Section 421(a)'s express exclusion of claims resulting "from the failure to perform a mere discretionary function or duty, even though the discretion involved be abused" (R. 28). Judge Sibley concurred on the independent ground that the complaint "does not allege any injury save that the child died in birth, which is not an actionable injury in Texas" (R. 29).

ARGUMENT

Petitioners, in seeking review of the affirmance by the court below of the trial court's dismissal of the complaint, urge two reasons in support thereof (Pet. 8-10). First, petitioners contend that both courts below erred in deciding that their claim is

not covered by the Act because of the Act's exception of claims based on the failure to perform a discretionary function. Second, they urge that the court below improperly treated their complaint as one alleging only a wrongful death action. Both contentions are, we submit, lacking in merit and further review by this Court is unwarranted.

1. *A claim of the character here asserted by petitioners is not comprehended by the Federal Tort Claims Act.* The first of the twelve express exceptions set forth in the Federal Tort Claims Act, Section 421(a), excludes, *inter alia*, "Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused" (See Appendix, *infra*, p. 11). As stated by the court below, the Act of July 5, 1884 (23 Stat. 112, 10 U.S.C. 96), which authorizes free Army medical service to Army officers' dependents "whenever practicable", "clearly stamps the obligation of the Government to provide medical service to Army dependents as discretionary in character" (R. 28). Accordingly, since the claim here involved is one "based upon . . . the failure to * * * perform a discretionary function", both courts below properly viewed it as falling within the express exclusionary language of Section 421(a).

In an endeavor to show that the function is not discretionary, petitioners refer to the provision of

the 1884 Act to the effect that Army medical officers "shall whenever practicable attend the families of the officers," and argue that use of the word, "shall" makes the function a mandatory one (Pet. 9-10). This argument, of course, completely overlooks the judgment and discretion which must be preliminarily exercised in determining the practicability of rendering medical aid. Cf. *United States v. Seaman*, 17 How. 225. This latitude and broad discretion may not, of course, be negatived by simply underscoring the word "shall". *Hecht Co. v. Bowles*, 321 U.S. 321; *The People ex rel. Sheppard v. Dental Examiners*, 110 Ill. 180; *Lloyd v. Ramsay*, 192 Iowa 103.

2. *Petitioners' contention that the complaint should be read as embracing some cause of action other than one for the wrongful death of their child, is unsupportable.* The Federal Tort Claims Act subjects the United States to liability for the negligent or wrongful acts of its employees to the same extent that a private employer would be liable "in accordance with the law of the place where the act or omission occurred." (Section 410(a), Appendix, *infra* p. 11). By so incorporating the *lex loci delicti* into the Act, the courts are required to refer to the local statutory and decisional law in determining whether a tortious and actionable wrong has been committed. *State of Maryland v. United States*, 165 F. 2d 869, 871 (C.A. 4); *Long v. United States*, 78 F. Supp. 35, 37 (S.D. Calif.); *Parmiter v. United States*, 75 F. Supp. 823, 824

(D. Mass.); *Wiltse v. United States*, 74 F. Supp. 786, 787 (W.D. La.); *Spell v. United States*, 72 F. Supp. 731 (S.D. Fla.). See, also, *Cuba Railroad Company v. Crosby*, 222 U.S. 473, 479; *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356. Since the alleged wrong here complained of occurred in Texas, it is the law of that state which governs. And under Texas law it is settled, as stated by Judge Sibley in his concurring opinion (R. 28-29), that no action lies for the death of a child resulting from injuries sustained before its birth. *Magnolia C.C.B. Co. v. Jordan*, 124 Tex. 347; see, also *Telegraph Co. v. Cooper*, 71 Tex. 507.²

The petition challenges neither the applicability of Texas law nor the inability, under that law, to maintain an action for the death of a child dying from injuries suffered before its birth. Instead, petitioners seek to avoid the impact of Texas law

² Accord: *Dietrich v. Northampton*, 138 Mass. 14; *Gorman v. Budlong*, 23 R.I. 169; *Newman v. City of Detroit*, 281 Mich. 60; *Buel v. Railroad*, 248 Mo. 126; *Stanford v. St. Louis-San Francisco Ry. Co.*, 214 Ala. 611. These holdings, which preclude the child's parents from recovering for prenatal injuries to the child, rest on the child's inability, had it survived, to maintain a personal action for such injuries. See *Lewis v. Steves Sash & Door Co.*, 177 S.W. 2d 350 (Texas). It seems to be well-established that the infant who survives prenatal injuries is barred from maintaining a personal action for those injuries. *Drobner v. Peters*, 232 N.Y. 220; *Stemmer v. Kline*, 128 N.J.L. 455; *Allaire v. St. Luke's Hospital*, 184 Ill. 359; *Berlin v. J. C. Penney Co., Inc.*, 339 Pa. 547; *Lipps v. Milwaukee E. R. & L. Co.*, 164 Wisc. 272; see, also, Restatement, Torts, Sec. 869. *Contra: Bonbrest v. Kotz*, 65 F. Supp. 138 (D. D. C.).

by contending here that their complaint was "broad and general", and intended to state a cause of action for direct personal injuries sustained by Mrs. Denny, who "has been nervous and upset ever since said incident and her health has been impaired" (Pet. 8). The record makes it perfectly clear, however, that the complaint stated a cause of action only for the allegedly wrongful death of the infant. The complaint itself was so captioned, *i.e.*, "Complaint for Negligent Death" (R. 2). Paragraph 2 of the complaint shows that suit was not filed by Mrs. Denny in a personal capacity for personal injuries sustained by her, but was in fact filed by Mrs. Denny and her husband "as the natural father and mother and next of kin of their infant son, Joseph Denny, who is now deceased" (R. 2). Nowhere in the complaint is there any allegation or indication of any personal injuries sustained by Mrs. Denny. The gravamen of the complaint is the death of the child allegedly resulting from the claimed negligent failure to dispatch an ambulance promptly (R. 3). During the argument on the motion to dismiss, counsel for petitioners expressly admitted that that was "the only act of negligence charged" (R. 10) and that they were "damaged by reason of the fact that the child died" (R. 11). In view of the unequivocal language of the complaint and counsel's candid admissions that it stated only what it purported to state, *i.e.*, a wrongful death action, there can be no basis for contending that the complaint must now be read

so as to state an entirely new and different cause of action. What petitioners now believe they might be able to prove, if permitted to go to trial, does not cure the vice of the complaint that it was an action for the wrongful death of their child and not an action for personal injury to Dorothy Mae Denny.³

³Petitioners' contention (Pet. 8) that the district court should have heard the evidence before passing on the motion to dismiss, is untenable. A motion to dismiss for failure to state a claim upon which relief can be granted takes the place, of course, of the former demurrer. *Dennis v. Village of Tonka Bay*, 151 F. 2d 411, 412 (C.A. 8); *Ledbetter v. Farmers B. & T. Co.*, 142 F. 2d 147, 149 (C.A. 4), certiorari denied, 323 U.S. 719, rehearing denied, 323 U.S. 813. Like a demurrer, it admits all of the well-pleaded facts of the complaint, which are taken to be true for the purpose of the motion. *Tahir Erk v. Glenn L. Martin Co.*, 116 F. 2d 865, 867 (C.A. 4); *Leimer v. State Mut. Life Assur. Co.*, 108 F. 2d 302, 305 (C.A. 8); *Federal Life Insurance Co. v. Ettman*, 120 F. 2d 837, 839 (C.A. 8), certiorari denied, 314 U.S. 660. Since it would be absurd for the trial court to hear evidence concerning facts which it assumed to be true for the purpose of the motion, it is obvious that the court properly passed on the motion without hearing evidence.

CONCLUSION

The decision of the court below is correct. There is no conflict and further review is not warranted. The petition for the writ of certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys,
Department of Justice.

MAY, 1949

APPENDIX

The pertinent provisions of the Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 931, 943), provided as follows: ⁴

SEC. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. Costs shall be allowed in all courts to the successful claimant to the same extent as if the United States were a private litigant, except that such costs shall not include attorneys' fees.

SEC. 421. The provisions of this title shall not apply to—

(a) Any claim based upon an act or omis-

⁴ See fn. 1, *supra*.

sion of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government, whether or not the discretion involved be abused.